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IN THE

# Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON

CHRISTOPHER JAMES DAMON HAIG,

*Petitioner*,

v.

SHARON DAMON, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii**

## BRIEF OF RESPONDENTS MICHAEL E. HAIG AND WENDY A. HAIG IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the state courts of Hawaii deprived Petitioner, Respondents Michael E. Haig and Wendy A. Haig, and other descendants of Samuel M. Damon, through his son, Henry F. Damon, of their property without due process of law by retroactively altering the meaning of per stirpes to reduce their fully-vested interests in the corpus of the trust created by the Damon will.

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## BRIEF OF RESPONDENTS MICHAEL E. HAIG AND WENDY A. HAIG IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 12.6 of the Rules of this Court, Respondents Michael E. Haig and Wendy A. Haig (the "Haig Respondents") submit this brief in support of the petition for a writ of certiorari seeking review of the judgment of the Supreme Court of Hawaii in this case. That opinion is reported at 128 P.3d 815 (2006). Pet. App. 1a-42a.

Respondents Michael E. Haig and Wendy A. Haig are among the descendants of Samuel M. Damon through his son, Henry F. Damon, and thus, along with Petitioner in this case, stand to be wrongly deprived of a substantial portion of their inheritance as a result of the decision below of the Supreme Court of Hawaii. That decision denied them due process of law by declining to inquire into the meaning of the words "per stirpes" both when the will was signed and at his death, when it was admitted to probate, in 1914 and 1924, respectively. Instead of seeking out the contemporary meaning, the court below defined the rights of those taking under the will in accordance with modern decisions about the meaning of per stirpes, which are demonstrably inconsistent with the meaning at the time the will was written and submitted to probate.

In addition to joining Petitioner's reasons for granting certiorari, the Haig Respondents wish to highlight the following reasons why this Court should grant certiorari to correct the deprivation of property rights by the Supreme Court of Hawaii.

## REASONS FOR GRANTING THE PETITION[1]

As the petition explains, under the corpus provision of Samuel M. Damon's will, which was drafted and signed in 1914, the Petitioner, the Haig Respondents, and others held vested rights from the time of their birth in the residuary estate of their great-grandfather, Damon, and their property interest was clearly established in 1924, the date of Damon's death, under the laws of Hawaii in force at the time. Pet. 8. The will afforded them, *inter alia*, rights to share in the distribution of the corpus of Damon's residuary estate at the time the Damon trust terminated, in accordance with the language of the will.

In ascertaining the meaning of the will's provision defining the distribution of corpus, the function of the state courts of Hawaii was to determine and to give effect to the donative intent of Damon as he expressed it in his will. *See Blair v. Ing*, 21 P.3d 452, 467 (Haw. 2001) (In interpreting testamentary documents, "the cardinal rule to which all other rules must bend is that the intention of the testator controls . . . ."); *see also Smith v. Bell*, 31 U.S. 68, 74 (1832) (Marshall, C.J.) ("The first and great rule in the exposition of wills, to which all rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. . . . It is emphatically *the will* of the person who makes it, and is defined to be 'the legal declaration of a man's intentions, which he wills to be performed after his death.' These intentions are to be collected from his words; and ought to be carried into effect if they be consistent with law. In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view.") (emphasis in original).

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[1] The Haig Respondents adopt and incorporate by reference the Parties to the Proceedings, Pet. ii, and Statement of the Case, Pet. 1-8, submitted by Petitioner in the petition for a writ of certiorari.

In that inquiry into Damon's intent, of course, it is the meaning and understanding of words used contemporaneously with Damon's usage that is relevant. *See Bishop Trust Co. v. Cooke Trust Co.*, 39 Haw. 641, 644 (1953) ("In trust deeds, as in wills, the intention of the donor must be ascertained from the documents as a whole and from the surrounding circumstances . . . ."); *In re Estate of Campbell*, 33 Haw. 799, 799 (1936) (court reviewed law in effect at time will was executed to determine testator's intent); *Mercer v. Kirkpatrick*, 22 Haw. 644, 647 (1915) (A court must "accept the aid of evidence of surrounding circumstances which will place the court as near as may be in the position of the testator as of the time he made the will.").

The present dispute regarding the proper allocation of the corpus turns on whether Damon intended a strict or modified per stirpes distribution of his residuary estate at the time the trust terminated, by use of the words "per stirpes and not per capita" in his will. Pet. App. 37a n.18; *see also* Pet. 6-8. If Damon intended a strict per stirpes distribution, then the stirpital root would be set at the level of his children, resulting in the corpus being divided into two shares, and thereafter subdivided by representation among the descendants of Samuel M. Damon's two children who had surviving issue, Samuel E. Damon and Henry F. Damon. Pet. App. 10a; Pet. 4. If Damon intended a modified per stirpes distribution, then the stirpital root would be set at the level of the first generation with living members at the time of the distribution—his great-grandchildren—resulting in equal shares for each of Damon's eighteen great-grandchildren, with the issue of any deceased great-grandchildren taking by representation. Pet. App. 10a; Pet. 4. Under the former approach, each taker in the line of Henry F. Damon (including Petitioner and the Haig Respondents) would receive either one-thirty-second (3.125 percent) or one-twenty-fourth (4.666 percent) of the residuary estate, depending on the number of children each

child of Henry F. Damon had (two had four children, two had three children), while each living great-grandchild in the line of his brother, Samuel E. Damon, would receive one-eighth (12.5 percent). Under the latter approach, Petitioner and the Haig Respondents, along with every other great-grandchild, would receive one-eighteenth (5.55 percent) of the residuary estate, Pet. 6, with the share of a deceased great-grandchild being taken by his or her issue per stirpes.

Rather than make any inquiry into the contemporaneous meaning of Damon's invocation of "per stirpes" at the time the will was written in 1914 and when it was submitted to probate upon his death in 1924, the Supreme Court of Hawaii instead relied on a 1995 decision of that court, *In re Trust of Estate of Dwight*, 909 P.2d 561 (Haw. 1995), and simply found that

> it is well established that "per stirpes" means "by or according to root," "according to or by stock," or "by right of representation," *i.e.*, that the descendants are to take through or as representatives of a parent. . . . Moreover, implicit in the phrase is the concept that the "root" or "stock" begins with the ancestors of those who are to take and not with the takers themselves.

Pet. App. 27a (quoting *In re Lock Revocable Living Trust*, 123 P.3d 1241, 1247 (Haw. 2005)) (emphasis omitted). Without examination of the 1914 or 1924 law, the Supreme Court of Hawaii concluded in *Damon* that "under Hawai'i law, per stirpes has [this] well-established and distinct meaning," and set the stirpital root at the level of Damon's children (strict per stirpes). Pet. App. 28a.

As set forth below, the failure of the Supreme Court of Hawaii even to inquire into the relevant common understanding of the language of the will—"per stirpes and not per capita"—at the time of drafting and death, has deprived Petitioner and the Haig Respondents of their rights to property under the will. Further, the court's reliance on its own conclusion in *Dwight* that "per stirpes has one distinct

meaning," Pet. App. 27a, effectuates a retroactive modification of longstanding rights under the will. By undertaking the retroactive application of new law to divest persons of their rights in property, the Supreme Court of Hawaii violated the due process rights of the Petitioner, the Haig Respondents, and others. This Court's review is thus warranted.

1. As the petition explains, the state of the law in Hawaii, as elsewhere, with regard to the effect of a per stirpes distribution of property in 1924, is set forth in the RESTATEMENT (FIRST) OF PROPERTY, which was published in 1940. Pet. 4-5. The RESTATEMENT, in a comment to Section 301 states unequivocally that, where a testator fails to expressly define the stirpital root that is to govern, "the heads of the respective stirpes are the 'possible takers' who are of the oldest generation in which there is at least one living member at the time when distribution is to be made." RESTATEMENT (FIRST) OF PROPERTY § 301, cmt. h. Thus, in this case, where the will provided for the distribution of corpus only upon the death of all children and grandchildren, and did not define a particular stirpital root, the first living generation—here, the great-grandchildren—are the "possible takers" where the stirpital root is set.

While there are no published decisions from Hawaii courts prior to 1924 announcing this (or any other) rule as the applicable rule in Hawaii, there are at least two reasons why this modified understanding of per stirpes is the only understanding that Damon could reasonably have had as to the effect of the language that he used in his will.

*First*, at the time of Damon's writing and death, the weight of case authority overwhelmingly favored modified per stirpes and rejected strict per stirpes, under which (absent contrary directive by the testator) the stirpital root is set invariably at the first generation below the testator. An American Law Reports annotation from 1922 discusses reported cases prior to 1924 which address the generational

level of the stirpital root, on facts, like those here, where the stirpital root is unidentified and the testator's children are no longer living at the time of the distribution. *See* 16 A.L.R. 15, at sub. IV (1922). All but one of the relevant cases are from English courts[2] and unequivocally adopt the rule of modified per stirpes set out in the RESTATEMENT (FIRST) and advocated by Petitioner.[3] Other cases our research has produced also adopt a modified per stirpes approach.[4] Thus in 1914 and in 1924, on the facts of this case, where a will called for per stirpes distribution at a time when the testator's children (and grandchildren) were all deceased, the stirpital root should be set at the level of the first living generation—

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[2] Hawaii law provides, as it has at all relevant times: "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage . . . ." Haw. Rev. Stat. § 1-1 (1993).

[3] The first case noted by the American Law Reports that explores the issue, *Robinson v. Shepard*, (1863) 46 Eng. Rep. 865 (H.L.), adopted the modified per stirpes rule. In 1867, a lower English court of equity applied a strict per stirpes rule in *Gibson v. Fisher*, (1867-1868) 5 L.R. Eq. 51 (Eng.). Thereafter, three English courts explicitly rejected *Gibson* and found the modified per stirpes rule of *Robinson* to be authoritative precedent. *In re Alexander*, (1919) 1 Ch. 371; *In re Dering*, [1911] 105 L.T.N.S. 404 (Eng.); *In re Wilson*, (1883) 24 Ch.D. 664. *See generally* Frederick J. Singley, Jr., Patchell v. Groom *Revisited: Distributions Among Descendants Per Stirpes*, 15 MD. L. REV. 1, 7 (1955). In 1914, the New York courts adopted the modified per stirpes rule, relying on the English authority. *In re Title Guar. & Trust Co.*, 106 N.E. 1043 (N.Y. 1914) (affirming 144 N.Y.S. 889 (N.Y. App. Div. 1913)). At best, the *Gibson* adoption of strict per stirpes was a common law aberration.

[4] *See Giles v. Von Cain*, 117 S.E. 488, 489 (W. Va. 1923) (holding that a bequest to the heirs of three deceased children would be divided among the grandchildren per capita, without regard to their parentage); *Taylor v. Cribbs*, 56 So. 952, 952 (Ala. 1911) (holding that when a bequest is to children or heirs of a named deceased individual, the children will take equally regardless of parentage).

here, the testator's great-grandchildren—and not, as the court below did, at the level of the first generation, that is the testator's own children.

*Second*, while not defined in any extant Hawaii court decision, the common understanding of a per stirpes distribution in Hawaii, when no child of an intestate is living, is set out in the language of the Hawaii intestacy statute that governed during this 1914 to 1924 timeframe.[5] That statute invokes the concept of a per stirpes distribution and expressly defines it in a manner that sets the stirpital root *not* at the level of the intestate's deceased children, but at the level of the *first living generation at the time of distribution*—that is, a modified per stirpes distribution. The statute makes clear, in the instance where there is "no child of the intestate living at his death, . . . [the intestate's] estate shall descend to all his other lineal descendants" under the following rules:

> If all the said descendants are in the same degree of kindred to the intestate, they shall share the estate per capita, that is, equally; otherwise they shall inherit per stirpes, that is, by each of the children taking a share, and the grandchildren, [that is] the children of a deceased child taking a share, to be afterwards divided among themselves.

Rev. L. Haw. § 3246 (1915); *see also* Rev. L. Haw. § 3305 (1925); 32 Haw. Civ. Code § 1448 (1898). According to this statute, then, a per stirpes distribution was understood to require *equal division among the first generation with any living members*, with the issue of each deceased member of that living generation dividing the share of the deceased member by right of representation.

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[5] That statute defines the rights of inheritance which shall govern when a person dies without a will and thus is not directly applicable to Damon's will. It does, however, reflect the contemporaneous understanding of the meaning of a per stirpes distribution.

For these reasons, it is clear that Damon could only have intended a modified per stirpes distribution of the residual corpus of his estate at the time the trust terminated. Any other understanding would be contrary to the common usage of per stirpes made plain in this time period by both contemporaneous judicial and legislative pronouncements.[6]

Ignoring the question of what Damon's words meant at the time they were used, the Supreme Court of Hawaii simply interposed its own modern understanding of per stirpes, expressed in its 1995 decision in *Dwight*, which held that any reference to per stirpes meant that a strict per stirpes distribution of the corpus was required. By thus ignoring the common understanding of per stirpes at the time of Damon's will and death, the court diminished the Petitioner and Haig Respondents' vested interest in the residuary estate by nearly 44 percent per person. The Supreme Court of Hawaii's retroactive application of a new judicial rule created in 1995 thus violated the due process rights of the Petitioner and the Haig Respondents, as well as the laws of Hawaii.[7] *See* Pet. 8-11.

2. As the petition shows, newly enacted legislation will not be applied retroactively, absent a clear statement of legislative intent to do so, Pet. 8-9, because the retroactive application of new legislation to conduct occurring previously generally raises serious questions of fairness and due process. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). This rule exists to protect property rights and other "interests in fair notice and

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[6] As the petition states, "[b]y the time the Damon trust was nearing termination, the law in Hawaii concerning per stirpes distributions had changed dramatically." Pet. 5. This change in the common approach to stirpital distributions was also noted in the RESTATEMENT (SECOND) OF PROPERTY § 28.1, cmt. 3(b) (1980), which only cites cases after 1945 as conflicting "with the old common-law rule [of modified per stirpes]."

[7] *See* Haw. Rev. Stat. § 1-3 (1993) ("No law has any retrospective operation, unless otherwise expressed or obviously intended.").

repose" that are essential to our constitutional order under the Due Process clause. *See Lynce v. Mathis*, 519 U.S. 433, 440 n.12 (1997) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)); *see also* Pet. 9.

In light of this understanding, there is a strong presumption against any such intent on the part of the legislature. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 284-85 (1994). Where that presumption is overcome by clear evidence of a contrary legislative purpose, the statute's retroactive application is subject to close constitutional scrutiny. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (invalidating retroactive liabilities under the Coal Health Benefits Act of 1992); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 637 (1993) (rejecting Due Process and Takings clause challenge to Multiemployer Pension Plan Amendments Act); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731-33 (1984) (rejecting due process challenge to Multiemployer Pension Plan Amendments Act of 1980); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19-20 (1976) (rejecting due process challenge to retroactive application of Black Lung Statute).

Of course, it is generally true that court decisions interpreting an existing law apply to any future application of that statute. This is so because they do not "pronounce a new law, but [ ] maintain and expound the old one." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (15th ed. 1809). They are generally applicable in pending cases in which that interpreted law governs, regardless of whether the decision pre-dates the conduct at issue. *Schriro v. Summerlin*, 542 U.S. 348, 350 (2004) ("New substantive rules generally apply retroactively" including decisions narrowing the scope of a criminal statute and placing the particular conduct or persons covered by a statute beyond the State's power to punish.) (emphasis omitted); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 89-90 (1993) (holding that Supreme Court's application of a

rule of federal law to the parties before the Court requires all courts to give retroactive effect to the decision thus applied).

But critical exceptions to this rule exist where the character of a decision is such as to make retroactive application unfair, because it would be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S. 347, 358 (1964) (internal quotation marks omitted); *e.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001) ("limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process").

A clear example of a situation where recent decisions are not properly applied wholesale to past conduct is that presented here—where the matter in issue is the proper understanding of a will drafted decades ago. The language of a will is to "be construed as of the date of its execution and in light of the then surrounding circumstances," or as of the time of the testator's death. 80 AM. JUR. 2d *Wills* § 1015 (2006) (citing *Adams v. Cowen*, 177 U.S. 471 (1900)); *see also In re Estate of Searl*, 811 P.2d 828, 830 (Haw. 1991) ("[I]t has been well settled that a will speaks from the time of the testator's death, and that what is spoken is subject to the laws in force at that time.") (internal quotation marks omitted). "The language employed in a conveyance, read as an entirety and in the light of the circumstances of its formulation, constitutes the objectively observable manifestation of the conveyor's intent and hence is necessarily assumed to evidence his subjective intent." RESTATEMENT (FIRST) OF PROPERTY § 242, cmt. a (1940). And that language is to be read in light of the law as it existed at the time the instrument was drafted and allowed by the testator to take effect. For a testator is presumed to know the law, both statutes and precedent, which are relevant to the disposition of his estate. *See N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 348-49 (1921); 80 AM. JUR. 2d *Wills* § 1039 (2006). By preparing a will, a testator creates certain rights, relying on the contemporaneous understanding of the

language used. In that context, arguments against courts ignoring that meaning, and simply applying new meanings of legal terms that evolved years later, "have special force." *See Thomas v. Wash. Gas & Light Co.*, 448 U.S. 261, 272 (1980).

Here the testator, Samuel M. Damon, executed his will in 1914 and left it unaltered so that it went into effect in 1924, using words whose meaning was unmistakable based on the common legal understandings of that time. "There is no question . . . that the right to pass on valuable property to one's heirs is itself a valuable right." *Hodel v. Irving*, 481 U.S. 704, 715 (1987). The rights to define the manner and recipients of that property, and to receive the property bequeathed, are no less valuable. Yet the Supreme Court of Hawaii ordered a distribution contrary to the then-common understanding, without making any inquiry at all into the meaning of the words at the time they were written. Further, it ignored the vested rights of Petitioner and the Haig Respondents and applied 1995 law to a 1914 will probated at the testator's death in 1924. By doing so, the Supreme Court of Hawaii acted contrary to the decisions of this Court and deprived Petitioner, the Haig Respondents, and the remaining descendants of Samuel M. Damon through his son, Henry F. Damon, of property without due process of law.

## CONCLUSION

For these reasons and those explained in Christopher Damon Haig's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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